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81-2227

No.

In the Supreme Court of the United States

October Term, 1981

JAMES E. JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Speedy Trial Act of 1974 [18 U.S.C. 3161 *et seq.*] countenance a delay of some 10 months between arrest and trial, where:

(a) following petitioner's arrest on September 24, 1980, petitioner was not taken before a United States Magistrate and no formal complaint, information or indictment was filed until July 9, 1981, when this suppressed indictment was filed;

(b) no legal excuse* was tendered by the government for the inordinate delay; and

(c) the charge in the indictment was identical to that giving rise to petitioner's arrest, and no additional evidence is alleged in the indictment which was not known to the government at the time of arrest?

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* The purported excuses tendered by the government at the hearing on petitioner's motion to dismiss the indictment on speedy trial grounds [that is, the co-existence of other "reverse sting" operations in the area, and the unfulfilled hope that petitioner would "cooperate"] are factually discounted in the contextual fabric of this case. See pp. 12-13, *infra*. In a nutshell, return of a sealed indictment [as was eventually done] obviated any jeopardy to undercover operations, and the government knew of petitioner's failure to "cooperate" by the end of May, 1981, more than 30 days before return of the indictment. (See Tr. I, 44; *cf.* App. A, p. 3.)

Hereafter, "R." refers to the Record on Appeal in the Eighth Circuit, No. 81-2205; "Tr. I" to the Transcript of Proceedings [hearing on petitioner's motion to dismiss based on violation of right to speedy trial] taken before Magistrate Noce on August 25, 1981; and "Tr. II" to the Transcript of Proceedings at trial, October 7-8, 1981.

2. Should the decision of the Eighth Circuit herein—where, in a case of first impression as to statutory interpretation of the Speedy Trial Act of 1974, the appeals court has affirmed the trial court's refusal to dismiss the indictment under the above-stated circumstances—holding that 18 U.S.C. 3161(b)'s requirement that an indictment or information must be filed within 30 days does not begin to run unless and until formal charges have been filed, stand as the law of the land?

Parties Involved†

Petitioner, James E. Jones, was the defendant in the District Court for the Eastern District of Missouri, Eastern Division, and appellant in the Court of Appeals for the Eighth Circuit. Respondent, the United States of America, was the prosecution (plaintiff) in the trial court, and appellee in the Court of Appeals.

† Per Rule 21.1(b).

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Certiorari should be allowed so that this Court may resolve this important question of statutory construction** respecting the implementation of one of the most basic federally guaranteed constitutional rights affecting the substantial constitutional and statutory rights of defendants within the federal criminal justice system—a question which should be, but has not been, resolved by this Court 9

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** The instant decision is one of first impression in this factual setting, which does not involve the dismissal of a former formal charge; rather, the simple factual situation is one of arrest, release, passage of some 10 months, filing of indictment. No other known federal appeals decision construes the Speedy Trial Act as does the Eighth Circuit at bar.

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In the
Supreme Court of the United States

OCTOBER TERM, 1981

NO.

JAMES E. JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, James E. Jones (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Eighth Circuit, to review its decision affirming his convictions for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Judgment and Opinion Below

The Opinion of the Court of Appeals for the Eighth Circuit, No. 81-2205, (not yet published) is set out as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On April 28, 1982, the Court of Appeals for the Eighth Circuit filed its Opinion affirming defendant's convictions. (App. A) No petition for rehearing was filed. This petition to review the judgment in a criminal case of a federal court of appeals is timely filed within 60 days after entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 20.1 of this Court.

Constitutional Provisions and Statutes[1] Involved

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."

The Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, provides, in pertinent part:

> Section 3161(b):
>
> "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."
>
> Section 3162(a)(1):
>
> "If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by Section 3161(b) as extended by Section 3161(h) of this chapter, such charge against that individual shall be dismissed or otherwise dropped."

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[1] For purposes of this Petition, there is no dispute as to the interpretation or application of the statutes for violation of which defendant stands convicted, 21 U.S.C. §§ 841(a)(1) and 846.

STATEMENT OF THE CASE

Nature of the Case

Petitioner, James E. Jones (hereafter, defendant), was charged in Indictment No. 81-130 CR (1) (R. 1-2) with (Count 1) conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846, and (Count 2) possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

After the District Court denied defendant's Motion to Dismiss the Indictment for violation of his speedy trial rights as codified in the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, (R. 25), he was tried by a jury and found guilty as charged. (R. 48)

The trial court sentenced defendant to 5 years custody, with a 3 year special parole term. (R. 49) The Court of Appeals for the Eighth Circuit affirmed. (App. A)

Jurisdiction of Trial Court

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendant here was charged with having committed offenses against the laws of the United States, to wit, 21 U.S.C. secs. 841(a)(1) & 846.

Statement of Facts

Facts re Offense. The facts of the case generally are set out in the reviewing court's opinion, (App. A, pp. App. 1-3), and are not repeated here to avoid unnecessary duplication.

Facts re Violation of Right to Speedy Trial. The specific facts relevant to the Questions Presented are as follows:

Facts and Circumstances Surrounding Defendant's Initial Arrest on September 24, 1980.

On September 24, 1980, defendant [with two co-defendants] was arrested by agents of the Drug Enforcement Administration (hereafter, DEA) in a parking lot at the Marriott Hotel near the Lambert Airport, St. Louis, Missouri, in connection with the matters alleged in the indictment. (Tr. I, 5-6)

At about 9:40 P.M., at least six officers—three of whom were DEA agents—arrested defendant. (Tr. I, 10) He was handcuffed, put into a van together with a co-defendant, and was told, "Don't talk to each other." (Tr. I, 20)

Defendant [and 2 others] was transported to the DEA offices in Clayton, Missouri; the handcuffs were removed and defendant was fingerprinted. The Agents attempted to photograph defendant, but the camera equipment was not operating. (Tr. I, 22-23)

Defendant was interrogated; pertinent personal information, such as home address, business address, social security number, marital status, etc., was taken from him. (Tr. I, 11) He was locked in a room where he remained until about 10:40 P.M., a little over an hour after his arrest. He was advised to go home; that he would be "notified." (App. A, p. 3)

The first "notification" he received was his re-arrest on the indictment on July 21, 1981—10 months after his initial arrest on the charges. (App. A, p. 3)

The Indictment

This indictment was returned on July 9, 1981. Defendant was taken into custody on July 21, 1981, at his place of business in Chicago, Illinois on a warrant as a result of the sealed and suppressed indictment. He appeared before the United States District Court for arraignment in St. Louis on July 27, 1981.

The allegations of the indictment track the alleged circumstances surrounding defendant's arrest on September 24, 1980. Both the overt acts alleged in the conspiracy charge (Count 1) and the substantive charge (Count 2) set out that the time of the alleged offenses was between September 18 and September 24, 1980, the night of the arrest.

When defendant was questioned upon arrest, per Par. 17 of the agents' investigative report of the arrest, defendant "refused to make a statement relative to the charge of violating U.S.C. Title 21 846, Conspiracy to Distribute Marijuana."

When defendant was released after arrest, such release was "pending indictment," per order of AUSA Michael Reak, according to Par. 18 of the same investigative report and the testimony of Agent Archie Luss. (Tr. II, 19)

The Decision Denying the Motion

After a hearing before the Magistrate (Tr. I), wherein evidence was adduced to the effect that defendant was arrested and initially released without formal charge because there were other reverse sting[2] operations continu-

[2] The practice of arranging to arrest citizens in connection with contraband supplied by the government—*i.e.*, where persons are "set up" buying government contraband from government agents—is known as "reverse sting."

ing which the agents felt would be jeopardized by publicity in the St. Louis area surrounding any charges brought against these defendants, (Tr. I, 13), and because, until the end of May, 1981, the agents were hopeful that defendant would "cooperate" with them (App. A, pp. 3-4), the Magistrate recommended that the Motion be denied, and the trial court so ruled. (R. 25).

Specifically, the trial court held that 18 U.S.C. 3161(b) does not require that the 30-day pre-indictment period begin to run upon defendant's arrest. (R. 18-25) The Court of Appeals affirmed. (App. A, p. 12)

REASONS FOR GRANTING THE WRIT

Prefatory Statement

The controlling conclusion adopted by both the District and reviewing courts—that 18 U.S.C. 3161(b) comes into play only if the arrested defendant has been formally charged with an offense—inexorably leads to the insufferable result that, so long as no formal charge has been filed, an arrestee can remain in limbo until the day the statute of limitations expires. This leaves the arrestee literally at the mercy of those in whose power it is to charge or not to charge him. It makes a mockery of the constitutional and statutory speedy trial provisions,[3] the purposes of which[4] are subverted by the interpretation adopted by the courts below.

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[3] The federally guaranteed right to a speedy trial, "one of the most basic rights preserved by our Constitution," *Klopfer* v. *North Carolina*, 386 U.S. 213, 226, 18 L.Ed.2d 1, 9 (1967), is an essential ingredient of due process of law. *Id.* at 222-26, 18 L.Ed.2d at 7-9. In *Klopfer*, wherein this Court first held the right to a speedy trial applicable to the States, the history of the right is traced back to recognition in the Assize of Clarendon (1166), *id.* at 223, 18 L.Ed. 2d at 8, even before its "first articulation in modern jurisprudence" in the Magna Carta in 1215. *Ibid.* For a thorough and fascinating history of the right, see *id.* at 223-26, 18 L.Ed.2d at 8-9. See also *Petition of Provoo*, 17 F.R.D. 183, 196-97 (D. Md. 1955).

In the "To be, or not to be" soliloquy, amidst the "slings and arrows of outrageous fortune," Shakespeare parallels "the law's delay" with "the oppressor's wrong." *Hamlet*, Act III, sc. i (circa 1602).

[4] Three distinct interests which the speedy trial provision was designed to protect are: (i) to prevent oppressive pre-trial incarce-

(footnote continued)

1.

The decision below—that 18 U.S.C. 3161(b) requires that a complaint be filed upon an arrest before the 30-day period begins to run within which an indictment must thereafter be filed—leads to unconscionable results at odds with the place of the speedy trial guarantee in our judicial system; most notably, it erodes that right based merely on unsubstantiated prosecutorial assertions, thus paving the way for utter frustration of the right to speedy trial via prosecutorial subterfuge.

(footnote continued)

ration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker* v. *Wingo*, 407 U.S. 514, 532, 33 L.Ed.2d 101, 118 (1972). Of these, only the first (*re* pre-trial incarceration) is inapplicable in a case as at bar, where arrest is followed by indictment with no intervening complaint. Factors (ii) and (iii) apply to an arrestee as well.

Moreover, there is no meaningful differentiation between an arrestee, such as defendant, though not at first charged, and an accused awaiting trial on bond, with respect to the following aspects of the harm to be obviated by speedy trial; in the words of the Court:

> "He might be subjected to public scorn, deprived of employment, and chilled in the exercise of his right to speak for, associate with, and participate in unpopular political causes." *Barker* v. *Wingo*, *id.* at 532 fn. 33, 33 L.Ed.2d at 118, fn. 33, citing *Klopfer* v. *North Carolina*, 386 U.S. 213, 221-22, 18 L.Ed.2d 1, 6-7 (1967).

See also *United States* v. *Dreyer*, 533 F.2d 112 (3 Cir. 1976), finding prejudice to the defendant via the psychological pressures of delay, and ordering the indictment dismissed.

Certiorari should be allowed so that this Court may resolve this important question of statutory construction* respecting the implementation of one of the most basic federally guaranteed constitutional rights affecting the substantial constitutional and statutory rights of defendants within the federal criminal justice system—a question which should be, but has not been, resolved by this Court.

Congress left no doubt that *arrest itself* brings about the terms of 18 U.S.C. 3161(b); and to follow the position of the District Court and the Eighth Circuit below as to what that statute requires, demands that one close his eyes to the plain language of the statute which, in clear, unmistakable terms, provides that arrest *or* service of summons triggers the consequences of the Act:

> "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested *or* served with a summons in connection with such charges . . ." (Emphasis added.)

The trial and reviewing courts' conclusion is especially ill-founded upon the peculiar facts herein, where no new information was developed as to the offense for which defendant was initially arrested and later formally charged, and the actual charges brought in the indictment tracked exactly the facts known to the arresting officers as of the date of defendant's arrest,[5] September 24, 1980.

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* The instant decision is one of first impression in this factual setting, which does not involve the dismissal of a former formal charge; rather, the simple factual situation is one of arrest, release, passage of some 10 months, filing of indictment. No other known federal appeals decision construes the Speedy Trial Act as does the Eighth Circuit at bar.

[5] *Cf. United States* v. *Peters*, 587 F.2d 1267 (D.C. Cir. 1978), where the reviewing court explicitly differentiated between charges indistinguishable from the facts giving rise to the initial arrest and those independent thereof. Thus, the Court of Appeals reliance on *Peters* is erroneous. (See App. A, p. 7)

Here, there is no dispute that the indictment was returned and filed almost 10 months after defendant's arrest. (R. 1, 3-11) Thus, applying the plain, unambiguous, mandatory disjunctive language of sec. 3161(b) in conjunction with the sanction (dismissal of the indictment) provided for in Sec. 3162(a)(2), [see statute set out at p. 2, *supra*], the indictment, returned, not within 30 days after arrest, but rather, almost 10 months thereafter, should have been dismissed.

Unlike *United States* v. *Peters*, 587 F.2d 1267 (D.C. Cir. 1978), where the government eventually proceeded on charges *not* identical to those upon which the initial arrest was based, (see fn. 5, *supra* and accompanying text), here, the circumstances surrounding defendant's arrest were *identical* to the allegations of the indictment, and there was no suggestion that the government needed any additional time or evidence to charge an offense.[8]

Additionally, material contained in the agents' arrest report (characterizing the offense as a violation of 21 U.S.C. 846, and noting that defendant's release was "pending indictment"; see Tr. II, 19 & p. 5, *supra*), further supports the conclusion that the alleged facts giving rise to arrest are identical to the allegations of the indictment.

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[8] *Cf. United States* v. *Hillegas*, 578 F.2d 453, 460 (2 Cir. 1978), where the government absolutely needed additional evidence (not available until some time after arrest) in order to proceed, justifying, per the court, the prosecutorial decision to dismiss a complaint and not to indict until such evidence became available, tolling the Speedy Trial statute and its local implementing provision. That situation does not obtain at bar; the reviewing court's reliance on *Hillegas* does not support the decision herein. (See App. A, p. 9.) See also *United States* v. *Lovasco*, 431 U.S. 783, 52 L.Ed.2d 752 (1977), also involving a delay for good-faith investigative purposes.

That defendant's release was "pending indictment" demonstrates not only that he was to be (as he in fact was) indicted upon charges identical to those involved in the arrest, but also that he was subject to "anxiety and concern" implicit in knowing that one is to be brought to trial—a state of mind that necessarily begins with arrest and does not wait to spring forth until the filing of formal charges. See *United States* v. *Dreyer*, 533 F.2d 112 (3 Cir. 1976); dissenting opinion in *United States* v. *MacDonald*, No. 80-1582, ... U.S. ....., ... L.Ed.2d ....., sl. op. pp. 5-8, decided March 31, 1982.

See also *United States* v. *Iaquinta*, 515 F.Supp. 708 (N.D.W.Va. 1981), holding the 30-day provision of sec. 3161(b) absolutely mandatory, and making no distinction between arrest accompanied by formal charge and arrest not so accompanied.

As this Court stated in *Dillingham* v. *United States*, 423 U.S. 64, 65, 46 L.Ed.2d 205, 207 (1975), quoting from *United States* v. *Marion*, 404 U.S. 307, 320-21, 30 L.Ed.2d 468, 479 (1971):

> "Invocation of the speedy trial provision thus need not await indictment, information or other formal charge."

And even the majority opinion in *United States* v. *MacDonald, supra*, recognized that the period between arrest and indictment must be considered in evaluating a Speedy Trial claim; sl. op. at 5, citing *Dillingham, supra*.

MacDonald does not Apply

As *MacDonald, supra*, is this Court's most recent Speedy Trial clause pronouncement, the Eighth Circuit heavily relied on that decision in reaching its conclusion against defendant below. (App. A, pp. 7-9.) However *MacDonald* is inapposite because, on its facts, only a

constitutional speedy trial claim was there made—not, as here, a contention based strictly upon the Speedy Trial Act of 1974. Moreover, the *MacDonald* decision was largely grounded on the circumstances involved in the initial dismissal of military charges against the defendant, followed by their later being refiled in District Court after extensive investigation. The government's good faith in proceeding with the new charges was an important factor in the majority's determination that the defendant had not been deprived of his constitutional right to a speedy trial. Here, on the other hand, we are dealing with an arrest based on *exactly* the same information as was later alleged in the indictment, with no good faith investigative reason for delay. Compare cases cited in footnote 6, *supra*.

There Was No Legal Excuse for the Inordinate Delay

Because, as has been demonstrated, the charges in the indictment were identical—to the last evidentiary detail—to those giving rise to defendant's initial arrest, the government lacks the excuse that additional time was needed for investigation.

Despite the government's contention at the evidentiary hearing that the agents were hopeful that defendant would "cooperate" and that this possibility justified the delay, it is clear that any such hopes the agents might earlier have had were effectively eliminated in the latter part of May, 1981 (Tr. I, 44), approximately 8 months after the arrest—after which time still more than 30 more days elapsed before indictment on July 9, 1981.

And, despite the self-serving government testimony from which the Magistrate concluded (and so recommended to the Court; see R. 18-25) that the delay was justified to protect "other reverse sting operations continuing which the agents felt would be jeopardized by

publicity in the St. Louis area surrounding any charges brought against these defendants," (R. 8-25; see Tr. I, 13), the simple fact is that the avoidance of publicity could have been accomplished, while still preserving defendant's speedy trial rights, by the simple expedient of a sealed indictment—as was done here anyway in July, 1981—rather than by the improper delay in utter disregard of the statutory requirements and of defendant's rights.

* * *

Defendant was not indicted until almost 10 months after his arrest. There was no legitimate reason sanctioned by any existing law for this inordinate delay. The charge in the indictment was identical to that giving rise to defendant's arrest, and no additional evidence is alleged in the indictment which was not known to the government at the time of arrest.

Under these circumstances, defendant's Motion to Dismiss for Lack of Speedy Trial should have been allowed. The District Court's and Eighth Circuit's result allowing the trial nonetheless to proceed places every arrested citizen at the mercy of those who decide whether or not, and, if so, when, to bring formal charges—a result unconscionable in our government of laws.

Based on the mandatory provisions of 18 U.S.C. 3161(b) and the sanctions provided in 18 U.S.C. 3162(a)(1),[7] defendant's convictions should be overturned.

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[7] Curiously, while acknowledging that the mandatory 30-day provision of sec. 3161(b) runs from arrest whether or not accompanied by formal charge, the Eighth Circuit further finds that because the sanction section, 3162(a)(1), fails specifically to provide for dismissal of indictments returned more than 30 days after arrest unaccompanied by formal charge, sec. 3161(b) in effect creates "a right without a remedy." App. A, p. 5. Upon so finding "a court should appropriately fashion a remedy rather than, as the Eighth Circuit has done, merely disregard the right.

Certiorari should be allowed so that this Court may resolve this important question of statutory construction respecting the implementation of one of the most basic federally guaranteed constitutional rights affecting the substantial constitutional and statutory rights of defendants within the federal criminal justice system—a question which should be, but has not been, resolved by this Court.

The Eighth Circuit's interpretation constitutes a dangerous anomaly which permits erosion of the speedy trial right based merely on unsubstantiated prosecutorial assertions, thus paving the way for utter frustration of the right to speedy trial via prosecutorial subterfuge.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be allowed. And, on the merits, defendant's convictions should be reversed and the cause remanded with directions to dismiss the indictment for violation of defendant's statutory speedy trial rights.

Respectfully submitted,

JULIUS LUCIUS ECHELES
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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 81-2205

United States of America,

Appellee,

v.

James E. Jones,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: March 11, 1982

Filed: April 28, 1982

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

ROSS, Circuit Judge.

James E. Jones appeals his conviction on a two count indictment for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846.

In September 1980, a DEA special agent, posing as a large scale drug distributor, had several conversations with Stevenson Smith regarding sale of a large quantity of marijuana. Smith told the agent that he would contact his people in Chicago and also indicated that his source in Chicago would be interested in delivering cocaine to the special agent. Arrangements were made by Smith to bring together the Chicago purchaser and the special agent.

On September 24, 1980, Smith and two other people met the special agent and two additional special agents at a St. Louis County hotel. Smith introduced James Jones to the agents as "his man." Jones told the agents that he wanted to buy 200 pounds of marijuana rather than the 300 pounds originally mentioned in Smith's conversation with the agent. Jones went with the agents to their car in the parking lot and took a sample from a bale of marijuana in the car's trunk. Smith and Jones then took the agents to a gold van parked in the lot to show the agents their money. On their way to the van, Jones asked the special agent if he would be interested in buying cocaine and indicated Jones would deliver a kilogram of cocaine to the agent the next day. Jones also said that he would return to St. Louis to purchase 250 pounds of marijuana the next day after he got the 200 pounds out on the street to his people in Chicago.

In the van the agents met Thomas McCready and after the agents counted the money they left to pick up the remaining bales of marijuana. The agents loaded four bales into two undercover cars and returned to the hotel. Upon returning to the hotel an agent was told by Smith that Jones had limited his purchase to 200 pounds because Jones was short of cash due to a recent purchase of 12

kilograms of cocaine. After going to the parking lot, the agents told appellant to pull his van up next to their cars. The agents opened the trunks of their cars and displayed the four bales of marijuana. The trunk key of one of the vehicles was then given to Jones. The agents then entered the van with Jones and they were given over $54,000 for the marijuana. After receiving the money the agents left the van and appellant and McCready took the two bales of marijuana from the agent's car trunk and put those two bales in the van. The agents then arrested Jones, Smith and McCready.

The arrest occurred at 9:40 p.m. on September 24, 1980. Jones was taken to the DEA offices in Clayton, Missouri. The agents contacted an assistant United States attorney and the attorney authorized Jones' release. At 10:40 p.m. on September 24, 1980, Jones was released and he was told that he would be "notified." No complaint or other charges were filed by the government until July 9, 1981, when an indictment was returned. The indictment was apparently sealed until July 20, 1981. On July 21, 1981, Jones was arrested on the indictment.

Jones moved to dismiss the indictment based on an alleged violation of the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.* A pretrial hearing was held before a United States magistrate regarding Jones' pretrial motion. At the hearing the special agent's uncontradicted testimony was that the government had delayed charging Jones for two reasons. First, until June 1981 the DEA was pursuing a number of "reverse sting" operations in the St. Louis area and there was a fear that publicity from charging a person would jeopardize the operations. Second, through May 1981, Jones and the DEA agent had frequent discussions during which Jones represented that he

could set up heroin purchases for the DEA; however, Jones never provided any information.

The magistrate recommended that Jones' pretrial motion be denied and this recommendation was adopted by the district court.[1]

On appeal, Jones alleges that the district court erred in denying his motion to dismiss the indictment for violation of the Speedy Trial Act. Jones also asserts the following errors: (1) the evidence was insufficient as a matter of law to establish that he was in "possession" of the marijuana; (2) the evidence was insufficient to establish the "chain of custody" of the substance alleged to be marijuana; (3) the district court erred in failing to grant a mistrial following introduction of "other crimes" evidence regarding the purchase and selling of cocaine.

Speedy Trial Act of 1974

Jones alleges that the delay between his initial arrest and subsequent indictment violated 18 U.S.C. § 3161(b) of the Speedy Trial Act of 1974 (the Act). That subsection provides in pertinent part:

> § 3161. Time limits and exclusions
>
> • • • •
>
> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

Jones argues that a violation of section 3161(b) requires dismissal of the charges against him under 18 U.S.C. § 3162(a)(1) of the Act, which provides:

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[1] The Honorable Kenneth Wangelin, Chief Judge, United States District Court for the Eastern District of Missouri.

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

The government argues that the case law and the legislative history of the Act establish that the term "arrest" as used in section 3161(b) means an arrest upon a complaint. The government also argues that the sanction of dismissal specified in section 3162(a)(1) applies by the terms of the statute only to an "individual against whom a complaint is filed."

While section 3161(a) may at first glance seem to clearly start the running of the speedy trial "clock" from arrest, it is also fairly clear that no "sanction" is provided for under section 3162(a)(1) for delay in indictment unless a complaint has been filed. However, to read the Act in this manner would create a right without a remedy. Our review of others parts of the Act, its legislative history and case law leads us to the conclusion that subsection 3161(b) is only applicable when the arrested individual is charged with an offense.

The Act specifies in subsection 3161(a) that "at the earliest practicable time" a trial date shall be set "[i]n

any case involving a defendant charged with an offense * * *" (emphasis added). Subsection 3161(d)(1) provides:

> (d)(1) If any indictment or information is dismissed upon motion of the defendant, or *any charge contained in a complaint filed against an individual is dismissed or otherwise dropped,* and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(Emphasis added.) A similar subsection of the Act, 3161 (h)(6), provides:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
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> * * * *
>
> (6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

These latter two subsections, 3161(d)(1) and (h)(6) have been interpreted to mean:

> (1) under subsection 3161(d)(1) if the complaint is dismissed upon the motion of the defendant or the

government, the time limits specified in subsection 3161(b) and (c) (the 30-day time limit for indictment and the 70-day time limit for trial) begins to run anew following the filing of a subsequent complaint, indictment or information.[2]

(2) under subsection 3161(h)(6) if the information or indictment is dismissed upon the motion of the government, the time between such dismissal and re-institution of subsequent charges is excludable, i.e., while the charges remain dismissed the time limit is tolled.

See United States v. *Peters*, 587 F.2d 1267, 1272-73 (D.C. Cir. 1978).

In the recent case of *United States* v. *MacDonald*, 50 U.S.L.W. 4347 (U.S. March 31, 1982), the Supreme Court held that a four year delay between dismissal of military charges for murder and a subsequent indictment did not establish a violation of the sixth amendment right to a speedy trial. The Supreme Court in *MacDonald* stated:

> In *United States* v. *Marion*, 404 U.S. 307, 313 (1971), we held that the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused:
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> > "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution.

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[2] It should be noted that two circuits have indicated in dicta that the prosecution should not be allowed under 3161(d)(1) to dismiss the complaint and start the clock anew *after* the time limits for bringing an indictment have passed. *See United States* v. *Peters*, 587 F.2d 1267, 1273 (D.C. Cir. 1978); *United States* v. *Hillegas*, 578 F.2d 453, 459 n.9 (2d Cir. 1978).

> These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him."

In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim. *Dillingham* v. *United States*, 423 U.S. 64 (1975). Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, see *United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977), or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.

Similarly, the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause.[7]

[7] Our holding agrees with the determination made by Congress in enacting the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.* The Act, intended "to give effect to the sixth amendment right to a speedy trial . . .," S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974), provides that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. §§ 3161(d), 3161(h)(6).

Id. at 4359.

While we recognize that *MacDonald* dealt with the constitutional right to speedy trial as opposed to the statu-

torily created rights in the Speedy Trial Act of 1974, the case does reflect the Supreme Court's view that not only the sixth amendment but also the Act requires that charges be pending for the delay to violate a right to speedy trial.

As noted in *United States* v. *Hillegas*, 578 F.2d 453 (2d Cir. 1978), the "policy and purpose" of the Speedy Trial Act has "been to expedite the processing of *pending* criminal proceedings, not to supervise the exercise by a prosecutor of his investigative or prosecutorial discretion at a time when no criminal proceeding is pending before the court." *Id.* at 456 (emphasis in original).

The legislative history, while less than precise, does reflect an assumption by Congress that any arrested individual would also be a "charged" or "accused" individual. In the House Report's general description of the time limits imposed by the bill the following comments were made:

> H.R. 17409 provides that all defendants *charged with criminal offenses* be brought to trial within 100 days of arrest or service of a summons, subject to a number of exclusions for necessary delay. The time limits are divided into three segments: the ultimate period between arrest and filing of an indictment or information would be 30 days, the period between indictment and arraignment, 10 days, and the period between arraignment and trial, 60 days.

H.R. Rep. No. 93-1508, 93d Cong., 2d Sess., *reprinted in*, [1974] U.S. Code Cong. & Ad. News 7401, 7414 (emphasis added). The general description also notes that exclusions from the time limits include periods of "deferred prosecution by the government." *Id.* at 7415. Additionally, in the House Report's "technical explanation of committee amendments" in commenting on the "arrest to indictment time limit" the following was indicated:

> *Section 3161(b)* provides that any information or indictment charging an individual with an offense must be filed within 30 days of the date the *accused* was arrested or served with a summons.

Id. at 7422 (emphasis added).

The House Report also reiterates that "the adoption of speedy trial legislation is necessary in order to give real meaning to the Sixth Amendment right." *Id.* at 7404. Considering the Supreme Court's statement in *MacDonald* that the right to speedy trial is only applicable to delay while charges are pending and considering the other provisions of the Speedy Trial Act which exclude delay while no charges are pending, the term "arrest" in section 3161(b) of the Act must be construed as an arrest where the person is charged with an offense.

It should be noted that an arrested person under Rule 5 of the Federal Rules of Criminal procedure is to be taken before the magistrate "without unnecessary delay." If the person is arrested without a warrant then a complaint must be filed when the person is taken before the magistrate. Nothing in rule 5, however, precludes the outright release of a person shortly after the arrest as was the case here. Also, Jones has not argued that the delay in prosecution violated his due process rights under the fifth amendment. *See MacDonald, supra,* 50 U.S.L.W. at 4359. We note that the proof required for such a violation requires a showing of prejudice and investigative delay, even if related to other persons, does not amount to a violation of due process even if prejudice is shown. *United States* v. *Lovasco,* 431 U.S. 783, 789-797 (1977); *United States* v. *Rogers,* 639 F.2d 438, 440-41 (8th Cir. 1981).

Other Issues

Jones argues that the evidence was insufficient as a matter of law, to establish "possession" because the government agents at all times had control of the bales of marijuana. "Possession may be actual or constructive * * *." *United States* v. *Hutchinson*, 488 F.2d 484, 488 (8th Cir. 1973), *cert. denied*, 417 U.S. 915 (1974). The evidence was sufficient to show that Jones obtained constructive possession when he was given the key to the agent's car trunk and obtained actual possession when he loaded the bales of marijuana into the van. The fact that the agents intended to arrest Jones and recover control of the marijuana does not negate the fact, that for however short a period of time, Jones was in actual control of the marijuana.

Jones also raises error in the sufficiency of the evidence regarding chain of custody of the samples of marijuana taken from the bales. There was some confusion at trial because the bales had been initially seized in August 1980 and samples were sent to the DEA laboratory. Additional samples were again sent from the bales after the sale made to Jones. The record indicates that the trial judge cleared up the confusion to his satisfaction based on examination of the dates on the seals of the exhibits regarding mailing and receipt of the samples by the DEA lab.

Jones also argues that the trial court erred in failing to grant a mistrial after introduction of testimony concerning possible sales of cocaine. Jones argues that this "other crimes" evidence was unfairly prejudicial and allowed the government to characterize Jones as a cocaine dealer. The government states that the evidence was admissible under Rule 404(b) of the Federal Rules of Evidence to show intent as to the distribution of marijuana. We agree that Jones' offer of sale of cocaine to the agent

and other testimony regarding Jones' cocaine dealings were relevant on the issue of intent to distribute. Additionally, considering the overwhelming evidence on the issue of intent to distribute, including Jones' own statements about getting the marijuana "out on the streets" and the large amount of marijuana involved, we would find any error in the admission of this testimony harmless beyond a reasonable doubt.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.